No. 10-786

Supreme Court, U.S.
FILED
FEB 11 2011
OFFICE OF THE CLERK

In The

Supreme Court of the United States

KINGDOM OF SPAIN and
THYSSEN-BORNEMISZA COLLECTION FOUNDATION,

Petitioners,

v.

ESTATE OF CLAUDE CASSIRER,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION

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PARTIES TO THE PROCEEDINGS

Respondent adopts petitioners' List of Parties, and notes that Beverly Cassirer, Claude Cassirer's widow, has been appointed Personal Representative of Claude Cassirer's estate. Respondent has moved in the court of appeals to substitute her as plaintiff in her representative capacity; petitioners have not opposed the motion.

TABLE OF CONTENTS

	Page
STATEMENT OF THE CASE	1
A. Factual Background	1
B. Procedural History	4
REASONS FOR DENYING THE WRIT	9
I. THERE IS NO NEED TO REVIEW THE HOLDING THAT SECTION 1605(a)(3) DOES NOT REQUIRE THE DEFENDANT FOREIGN STATE TO HAVE TAKEN THE PROPERTY	10
A. The Court of Appeals' Holding Does Not Conflict With the Holding of Any Other Court	10
B. The Court of Appeals' Holding Does Not Conflict With Any Stated Policy of the State Department	12
C. The Issue Has Limited Significance	14
D. The Court of Appeals' Holding Is Correct	16
E. Any Doubts Should Be Resolved In Favor of Denying Certiorari Because the Case Is In an Interlocutory Posture	19
II. THERE IS NO NEED TO REVIEW THE COURT OF APPEALS' EXHAUSTION HOLDING	20

TABLE OF CONTENTS – Continued

Page

A. The Question Whether the FSIA Requires Exhaustion of "Available Remedies" Is Not Properly Presented 20

B. The Court of Appeals' Holding That Section 1605(a)(3) Does Not Make Exhaustion "A Statutory Prerequisite To Jurisdiction" Is Narrow and Correct 21

C. The Holding Is Consistent With the Only Other Court of Appeals Decision to Discuss the Issue 24

D. Reviewing the Court of Appeals' Holding Before Prudential Exhaustion Is Litigated on Remand Would Be Premature 25

III. THERE IS NO CONSTITUTIONAL ARGUMENT PROPERLY PRESENTED HERE 26

CONCLUSION 27

TABLE OF AUTHORITIES

Page

CASES

Agudas Chasidei Chabad of United States v. Russian Federation, 466 F. Supp. 2d 6 (D.D.C. 2006) 10, 12

Agudas Chasidei Chabad of United States v. Russian Federation, 528 F.3d 934 (D.C. Cir. 2008) 11, 12, 24, 25

Altmann v. Republic of Austria, 142 F. Supp. 2d 1187 (C.D. Cal. 2001) 10, 12

Anderman v. Federal Republic of Austria, 256 F. Supp. 2d 1098 (C.D. Cal. 2003) 10, 12

Antolok v. United States, 873 F.2d 369 (D.C. Cir. 1989) 13

Case Concerning Elettronica Sicula S.p.A. (ELSI) (U.S. v. Italy), 1989 I.C.J. 15 (July 20) 22

Clark v. Arizona, 548 U.S. 735 (2006) 26

Dean v. United States, 129 S. Ct. 1849 (2009) 8, 16

Greenpeace, Inc. (U.S.A.) v. France, 946 F. Supp. 773 (C.D. Cal. 1996) 23

Hilao v. Estate of Ferdinand Marcos, 103 F.3d 767 (9th Cir. 1996) 20

Interhandel Case (Switz. v. U.S.), 1959 I.C.J. 6 (Mar. 21) 22

Meyers v. Bethlehem Shipbuilding Corp., 303 U.S. 41 (1938) 22

TABLE OF AUTHORITIES – Continued

Page

Millicom International Cellular, S.A. v. Republic of Costa Rica, 995 F. Supp. 14 (D.D.C. 1998).....23

Nemariam v. Federal Democratic Republic of Ethiopia, 491 F.3d 470 (D.C. Cir. 2007) 18

Patsy v. Board of Regents, 457 U.S. 497 (1982).....22

Republic of Austria v. Altmann, 541 U.S. 677 (2004).....11, 17, 23

Siderman de Blake v. Republic of Argentina, 965 F.2d 699 (9th Cir. 1992) 24

Vencedora Oceanica Navigacion, S.A. v. Compagnie Nationale Algerienne de Navigation, 730 F.2d 195 (5th Cir. 1984) 11, 12

Verlinden B.V. v. Central Bank of Nigeria, 461 U.S. 480 (1983).....13

Watson v. United States, 552 U.S. 74 (2007) 17

FEDERAL STATUTES

22 U.S.C. § 2370(e)(2).....18

28 U.S.C. § 1330(b).....6

28 U.S.C. § 1350 (note 2(b)).....21

28 U.S.C. § 1391(f).....5, 6

28 U.S.C. § 1602 13

28 U.S.C. § 1605(a)(3).....*passim*

28 U.S.C. § 1608 6

42 U.S.C. § 2000e-5 22

TABLE OF AUTHORITIES – Continued

Page

STATE STATUTES

CAL. CIV. PROC. CODE § 338 15

RULES

FED. R. CIV. P. 12(b)(6) 5

S. CT. R. 14.1(a) 26

OTHER AUTHORITIES

Declaration of the Vilnius International Forum on Holocaust Era Looted Cultural Assets (2000) 15

H.R. Rep. No. 94-1487 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604 ..... 13, 18, 19

Marilyn E. Phelan, *Scope of Due Diligence Investigation in Obtaining Title to Valuable Artwork*, 23 SEATTLE U. L. REV. 631, 633-34 (2000) 19

Resolution 1205 of the Parliamentary Assembly of the Council of Europe (1999) 15

"Resolved Stolen Art Claims," http://www.herrick.com/siteFiles/Publications/98000AB314D82ED6C13289319BBE9562.pdf 14

RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 455 12

RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 713 23

TABLE OF AUTHORITIES – Continued

Page

Terezin Declaration of the Holocaust Era Assets Conference (2009) 15

Washington Conference Principles on Nazi-Confiscated Art (1998) 15

STATEMENT OF THE CASE

Under Section 1605(a)(3) of the Foreign Sovereign Immunities Act (the "FSIA"), a foreign state or instrumentality is not entitled to sovereign immunity if "rights in property taken in violation of international law are in issue and . . . that property . . . is owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States." 28 U.S.C. § 1605(a)(3). This case presents two questions: (1) whether the Court should rewrite Section 1605(a)(3) to insert the words "by the foreign state" after "taken in violation of international law," so that the statute would require the defendant foreign state to have taken the property at issue; and (2) whether the Court should insert a mandatory, jurisdictional exhaustion requirement into Section 1605(a)(3), notwithstanding the possibility that courts can already require exhaustion as a prudential matter. The Ninth Circuit refused to take either step, deciding instead to adhere to the statute as written. It then remanded the case for further proceedings to determine whether petitioners should be required to return a painting in their possession that the Nazis stole from the grandmother of Respondent Claude Cassirer.

A. Factual Background

1. Camille Pissarro completed *Rue Saint-Honoré, après-midi, effet de pluie* (the "Painting") in

1897. His representative, Durand-Ruël, sold it in 1898 to Julius Cassirer. The Cassirers were a well-known and highly regarded Jewish family that played a leading role in Germany's economic and cultural life until the Nazis drove them from the country in the 1930s. When Julius Cassirer died in 1924, his son, Fritz Cassirer, and Fritz's wife, Lilly, inherited the Painting. Fritz and Lilly had one child, Eva, who in turn had one child, Claude Cassirer. Eva Cassirer died in an influenza epidemic in 1921 when Claude was four months old. Claude was raised largely by his grandmother, Lilly, and was Lilly's sole heir. Claude Cassirer has vivid memories of seeing the Painting hanging in his grandmother's parlor.

As a Jew, Lilly was subjected to increasing persecution in Germany after the Nazis seized power in 1933. By 1939, Lilly felt she had no choice but to flee Germany. Lilly had to obtain official permission to leave Germany and to take any property of value with her. A Nazi agent told Lilly that she could not take the Painting out of Germany and demanded that she hand it over to him in exchange for a derisory payment of 900 Reichsmarks – about $360 at 1939 exchange rates. Although she knew that she would never be permitted to take even that nominal payment with her when she fled to England because it would be paid into a blocked bank account, Lilly surrendered the Painting as demanded.

2. Unbeknownst to Lilly, who never learned of its whereabouts before she died in 1962, the Painting was sold at auction in Berlin to an anonymous

purchaser in January 1943. The Painting next turned up in 1952, when a New York gallery sold the Painting to a private collector in St. Louis. In 1976, Baron Hans-Heinrich Thyssen-Bornemisza, one of the world's largest private collectors of art, purchased the Painting. Eventually Baron Thyssen-Bornemisza began looking for a permanent home for his art collection, and in 1988, Baron Thyssen-Bornemisza granted Spain a ten-year lease on his collection in exchange for approximately $50 million.

In 1993, Spain co-founded the Thyssen-Bornemisza Collection Foundation (the "Foundation") and gave it 42,277,120,000 Pesetas – more than $327 million – to purchase the Thyssen-Bornemisza collection, including the Painting. Spain also spent millions of dollars to refurbish a palace it owned, the Villahermosa Palace, and provided it to the Foundation at no charge as a home for the Thyssen-Bornemisza Museum. If the Foundation ceases to use the Palace to house the collection, the Palace will revert to Spain, and if the Foundation ceases to exist, Spain will become the owner of the Thyssen-Bornemisza collection.

At least two-thirds of the directors on the Foundation's Board must be representatives of the Spanish government, nominated and removed freely by the government through royal decree. In fact, four of the governmental directors of the Foundation serve by virtue of their high positions in the Spanish government: Spain's Minister of Culture, its Secretary of State for Culture, its Secretary of State for Budget

and Expenses, and its Undersecretary of Culture, are all ex officio members of the Foundation's Board.

B. Procedural History

1. In 2000, Mr. Cassirer discovered that the Painting was in the Thyssen-Bornemisza Museum. After Spain and the Foundation refused his repeated requests to return the Painting, Mr. Cassirer sued them in the United States District Court for the Central District of California to recover it or, alternatively, to obtain damages to compensate for petitioners' conversion. Mr. Cassirer founded subject matter jurisdiction on Section 1605(a)(3) of the FSIA, which, as noted above, allows a plaintiff to sue a foreign state and its instrumentality when "rights in property taken in violation of international law are in issue," and if the instrumentality "own[s] or operate[s]" the property and "is engaged in a commercial activity in the United States." 28 U.S.C. § 1605(a)(3).

Petitioners moved to dismiss Mr. Cassirer's claims, primarily on the grounds that they were entitled to sovereign immunity because Section 1605(a)(3) did not apply for five reasons. First, petitioners claimed that Section 1605(a)(3) requires the defendants themselves to have taken the property at issue in violation of international law. Second, petitioners asserted that Section 1605(a)(3) requires plaintiffs to exhaust available remedies in other countries as a mandatory jurisdictional prerequisite. Third, petitioners claimed that the Foundation did not engage in "a commercial

activity in the United States," as required by Section 1605(a)(3). Fourth, Spain argued that the Painting was not taken in violation of international law because the Nazi appraiser who forced Lilly Cassirer to sell the Painting was not a state actor. Fifth, Spain asserted that because Lilly was a German national, the Nazis' taking of the Painting from her as part of its campaign of genocide against Jews did not violate international law.[1]

In addition to sovereign immunity, petitioners sought dismissal on the grounds that personal jurisdiction was lacking and venue was improper because the Foundation did not engage in sufficient commercial activity in the United States.[2] Lastly, Spain argued that no case or controversy existed, and moved to dismiss under Rule 12(b)(6) for failure to state a claim, because Mr. Cassirer did not allege any actions by Spain or that Spain owns the Painting.

The district court rejected petitioners' sovereign immunity arguments. Agreeing with the only other federal court opinions ever to have addressed the issue, the district court held that Section 1605(a)(3) does not require the defendant foreign state itself to have taken the property in violation of international law. Pet. App. 104a. The district court also held that the plain language of the FSIA does not contain any

[1] The Foundation did not join in these last two arguments.

[2] Spain also argued that the District of Columbia is the proper venue pursuant to 28 U.S.C. § 1391(f)(4).

mandatory exhaustion requirement. *Id.* at 107a-108a. To hold that the Foundation engaged in "a commercial activity in the United States," the district court cited the voluminous evidence of the Foundation's contacts with the United States, including the purchase of a poster of the Painting by an individual residing in the Central District of California and the use of the Painting in a promotional video shown on Iberia Airlines flights between the United States and Spain. *Id.* at 121a-133a. Last but not least, the court held that the Nazi appraiser who forced Lilly Cassirer to sell the Painting in order for her to leave Germany was an agent of the German government, and that because Germany had stripped Jews like Lilly Cassirer of their German citizenship, the taking of the Painting from her could constitute a violation of international law. *Id.* at 108a-110a.

Petitioners' other arguments for dismissal fared no better. The court held that it could exercise personal jurisdiction over petitioners pursuant to 28 U.S.C. § 1330(b), which provides that foreign states and their agencies and instrumentalities are subject to personal jurisdiction if they are not entitled to sovereign immunity and have been served in accordance with 28 U.S.C. § 1608. Pet. App. at 111a-117a. As to petitioners' venue argument, the court held that the Foundation is doing business in the Central District, making venue proper pursuant to 28 U.S.C. § 1391(f). Pet. App. at 136a-137a. The court also held that a case or controversy exists, and that Mr. Cassirer stated a claim against Spain, because Spain

controls the Foundation and the Foundation claims to own the Painting. *Id.* at 104a-105a, 137a-139a.

2. A three-judge panel of the Ninth Circuit exercised jurisdiction over three of the district court's sovereign immunity rulings[3] and affirmed the holdings that Section 1605(a)(3) does not require the defendant foreign state to have taken the property at issue and that the Foundation is engaged in "a" commercial activity in the United States, but remanded with instructions to the district court to consider whether to impose an exhaustion requirement. Pet. App. 67a-85a. Judge Ikuta concurred with the first two holdings, but dissented from the last, arguing that the FSIA does not require exhaustion. *Id.* at 85a-99a.

3. The court of appeals sua sponte ordered the case reheard en banc and, by a 9-2 vote, affirmed the district court in part and dismissed the appeal in part.

Speaking through Judge Rymer, the Ninth Circuit held that 1605(a)(3) does not require the defendant foreign state to have taken the property at issue in violation of international law. The court of appeals reasoned that the text of the statute "is written in the

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[3] Spain did not appeal the portions of the ruling holding that the Nazi appraiser who forced Lilly to sell the Painting was an agent of the German Reich, and that the taking of the Painting from Lilly could have been in violation of international law because she had been stripped of her German citizenship, nor did petitioners challenge venue on appeal.

passive voice, which 'focuses on an event that occurs without respect to a specific actor.'" Pet. App. 17a (quoting *Dean v. United States*, 129 S. Ct. 1849, 1853 (2009)). Thus, the statute "would have to be rewritten in order to carry the meaning the Foundation ascribes to it." Pet. App. 17a. The court of appeals also reviewed the FSIA's legislative history and found nothing suggesting that Congress intended to limit Section 1605(a)(3) to claims against a foreign state that took the property. *See* Pet. App. 17a-22a.[4]

The court of appeals further held that Section 1605(a)(3) does not require the plaintiff to have exhausted remedies in a foreign country before commencing suit. In so holding, the Ninth Circuit relied on the unambiguous language of Section 1605(a)(3) and the absence of any suggestion in the legislative history that Congress intended to require exhaustion. *See* Pet. App. 30a-32a. The court of appeals, however, "went no further" than rejecting petitioners' mandatory exhaustion argument. *Id.* at 36a. It "decline[d] to consider at this stage of proceedings whether prudential exhaustion may be invoked to affect when a decision on the merits may be made." *Id.* at 38a.

As for the remainder of petitioners' arguments for dismissal (alleged lack of case or controversy and lack

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[4] The court of appeals also held that Section 1605(a)(3)'s jurisdictional nexus requirement was satisfied because the Foundation "is engaged in a commercial activity in the United States." *See* Pet. App. 25a-30a. Petitioners do not seek review of this aspect of the decision.

of personal jurisdiction), the court of appeals held that it did not have appellate jurisdiction over those issues in this interlocutory appeal. *Id.* at 9a-12a.

Two judges dissented. They did not disagree with the majority's exhaustion analysis or its dismissal of petitioners' arguments that did not go to subject matter jurisdiction, but argued that "Congress would not have intended" to deny sovereign immunity when the foreign state defendant did not take the property in violation of international law. *Id.* at 38a-39a.

REASONS FOR DENYING THE WRIT

Neither of the questions that petitioners present warrants review. The court of appeals' holding that Section 1605(a)(3) does not require the defendant foreign state to have taken the property at issue does not conflict with the holding of any federal court or with any stated policy of the State Department. The holding also involves an issue that arises extremely infrequently, and is likely to be outcome-determinative even less often. Finally, the holding faithfully interprets the plain language of the statute and is therefore correct. The court of appeals' holding that the FSIA does not require exhaustion is likewise consistent with the only other case from the court of appeals on the subject and – to the extent petitioners even challenge the court's actual holding on exhaustion here – is correct on the merits. Finally, the case's interlocutory posture counsels against granting

certiorari. If proceedings on remand show that either of the questions presented matter to the ultimate outcome of this case, or if any problems or difficulties arise in other cases as a result of the court of appeals' decision here, this Court could consider granting review at a later time.

I. THERE IS NO NEED TO REVIEW THE HOLDING THAT SECTION 1605(a)(3) DOES NOT REQUIRE THE DEFENDANT FOREIGN STATE TO HAVE TAKEN THE PROPERTY

A. The Court of Appeals' Holding Does Not Conflict With the Holding of Any Other Court

This case presents the relatively unusual situation where a defendant foreign state and its agency or instrumentality possess property that was taken in violation of international law by another state. As far as respondent can tell, this issue has arisen in only three cases besides this one in the thirty-four years that the FSIA has been on the books. Each time the question has arisen, federal district courts have held that Section 1605(a)(3) does not require the defendant to have taken the property. *See Agudas Chasidei Chabad of United States v. Russian Federation*, 466 F. Supp. 2d 6, 19-20 (D.D.C. 2006), *rev'd in part on other grounds*, 528 F.3d 934 (D.C. Cir. 2008); *Anderman v. Federal Republic of Austria*, 256 F. Supp. 2d 1098, 1109-10 (C.D. Cal. 2003); *Altmann v. Republic of Austria*, 142 F. Supp. 2d 1187, 1202 (C.D. Cal.

2001), *aff'd*, 317 F.3d 953 (9th Cir. 2002), *aff'd*, 541 U.S. 677 (2004). This Court ultimately granted certiorari in *Altmann*, but the defendant did not even press this issue, and this Court allowed the plaintiff's lawsuit to go forward. *See Republic of Austria v. Altmann*, 541 U.S. 677 (2004). This case is the first time an appellate court has considered whether Section 1605(a)(3) requires the defendant to have taken the property at issue, and the court of appeals' holding here is consistent with these three district court decisions and the outcome in *Altmann*.

Petitioners nonetheless contend (Pet. 15-17) that the court of appeals' holding conflicts with the reasoning in *Agudas Chasidei Chabad of United States v. Russian Federation*, 528 F.3d 934 (D.C. Cir. 2008), and *Vencedora Oceanica Navigacion, S.A. v. Compagnie Nationale Algerienne de Navigation*, 730 F.2d 195 (5th Cir. 1984). They are incorrect. In *Agudas*, the defendant did not appeal the district court's holding that Section 1605(a)(3) applied regardless of whether the defendant had taken the property. *See* 528 F.3d at 943. And the D.C. Circuit found it unnecessary to address the issue, holding instead that the defendant itself had effectively taken the property. *See id.* at 943-46, 948-50. In *Vencedora*, the Fifth Circuit likewise did not address the question presented here. Instead, it considered whether an instrumentality of the Algerian government "owned or operated" a vessel, as required in the nexus portion of Section 1605(a)(3). 730 F.2d at 204. The court specifically

noted that it was not deciding whether any property had been "taken in violation of international law." *Id.*[5]

B. The Court of Appeals' Holding Does Not Conflict With Any Stated Policy of the State Department

The State Department – and in particular its Special Envoy for Holocaust Issues – has been aware of this case since its inception, yet it has not filed any objection to Mr. Cassirer's arguments or claims, or to any of the several court rulings in Mr. Cassirer's favor. Nor did the State Department file any statements in *Agudas*, *Anderman*, or *Altmann* advocating limiting Section 1605(a)(3) to cases where the defendant foreign state took the property at issue.

Petitioners nevertheless claim that the court of appeals' decision conflicts with State Department policy, citing the policy governing when the United States government will "espouse" an expropriation claim against a foreign state on behalf of a U.S. citizen. Pet. 11. As petitioners surely must understand,

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[5] Similarly, and contrary to petitioners' claim, *see* Pet. 16 n.9, the RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES (the "Restatement") does not address the situation where the defendant foreign state is not the entity that took the property. The Restatement simply confirms that under the FSIA, foreign states are not immune from suits alleging that they took property in violation of international law. *See* Restatement § 455. The Restatement is silent regarding what happens when the defendant state did not take the property at issue.

however, the State Department's policy on espousal has no bearing on this case. "In international law the doctrine of 'espousal' describes the mechanism whereby one government adopts or 'espouses' and settles the claim of its nationals against another government." *Antolok v. United States*, 873 F.2d 369, 375 (D.C. Cir. 1989). This is a rarely used mechanism reserved for exceptional cases in which the United States chooses to seek a diplomatic solution to an individual's case. (Even when the conditions for espousal are satisfied, whether the United States will espouse a claim is purely discretionary on its part.) Mr. Cassirer is not, however, requesting that the United States espouse his claim. Rather, he is suing in his individual capacity, as the FSIA allows him to do.

The State Department policy on espousal says nothing about how to interpret Section 1605(a)(3) of the FSIA. Indeed, the very purpose of the FSIA is to "free the Government from the case-by-case diplomatic pressures, to clarify the governing standards, and to 'assur[e] litigants that . . . decisions are made on purely legal grounds and under procedures that insure due process.'" *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 487-88 (1983) (quoting H.R. Rep. No. 94-1487, at 7 (1976)). Accordingly, the FSIA explicitly states that "[c]laims of foreign states to immunity should henceforth be decided by courts of the United States and of the States in conformity with the principles set forth in this chapter," 28 U.S.C. § 1602, not by any kind of discretionary State

Department decision making. That is exactly what the court of appeals did here.

C. The Issue Has Limited Significance

The issue whether Section 1605(a)(3) denies sovereign immunity for claims against foreign states that did not take the property at issue not only has arisen extremely infrequently, it also is unlikely to arise any more often in the future. The only context in which the issue seems to arise is with respect to property stolen by the Nazis, and there is obviously a finite amount of such property. Even within that category, there cannot be much property that satisfies all of the criteria necessary to give rise to the question presented here: (1) property that is now owned by a foreign state (as opposed to a private party); (2) property (or property exchanged for such property) that is present in the United States in connection with a commercial activity, or is held by an agency or instrumentality of the foreign state that engages in commercial activity in the United States; and (3) property the foreign state, in contravention of prevailing international norms, refuses to give back to the Holocaust survivor or his or her heir, even after learning of the property's true history.[6]

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[6] Spain's rejection of Mr. Cassirer's request for the return of the Painting contrasts sharply with the attitude in the United States towards such claims: individuals and institutions in the United States have resolved 41 such claims. *See* "Resolved Stolen

(Continued on following page)

Furthermore, in the unlikely event that the issue comes up in the future, the defendants will have other, independent arguments that could very well result in the dismissal of the litigation. For starters, statutes of limitations tend to give only a limited number of years in which to bring claims for the return of stolen property. Even when those statutes are tolled by way of "discovery rules," the limitation period generally starts running from the moment the claimant has "[i]nformation or facts that are sufficient to indicate that the claimant has a claim for a possessory interest" in the property. CAL. CIV. PROC. CODE § 338. Prudential exhaustion provides another potential hurdle for plaintiffs with these claims, as the court of appeals suggested. Pet. App. 38a.

Art Claims," http://www.herrick.com/siteFiles/Publications/98000AB314D82ED6C13289319BBE9562.pdf. Indeed, many other countries (or their instrumentalities) have returned Nazi-looted art, including Austria, Canada, France, Germany, Russia, and the United Kingdom (but Spain is not among them). *Id.*

Indeed, petitioners' refusal to return the Painting is contrary to the commitments to return Nazi-looted art that Spain made when it subscribed to the 1998 Washington Conference Principles on Nazi-Confiscated Art, Resolution 1205 of the Parliamentary Assembly of the Council of Europe in 1999, the Declaration of the Vilnius International Forum on Holocaust Era Looted Cultural Assets in 2000, and, while this litigation was pending, the Terezin Declaration of the Holocaust Era Assets Conference in 2009. By joining these declarations, Spain pledged to resolve claims for the return of Holocaust looted art promptly and equitably. These principles may be found at www.lootedartcommission.com/international-principles.

This case illustrates the array of arguments a foreign state can make to squelch a lawsuit to recover Nazi loot. Petitioners filed motions to dismiss in the district court asserting defenses wholly independent of sovereign immunity, including no case or controversy, failure to state a claim, lack of personal jurisdiction, and improper venue.

D. The Court of Appeals' Holding Is Correct

The Ninth Circuit correctly held that Section 1605(a)(3) does not require petitioners themselves to have taken the Painting in violation of international law. Section 1605(a)(3) provides that a foreign state is not entitled to sovereign immunity "in a case . . . in which rights in property taken in violation of international law are in issue." The plain language of this statute – specifically, the reference in the passive tense to the property having been "taken" – requires only that property was taken in violation of international law; it does not specify who must have taken the property.

Petitioners claim, however, that the statute is "ambiguous" because it does not "expressly say that the property must have been taken 'by *any* foreign state.'" Pet. 18. Yet this Court's precedent makes clear that such words are unnecessary when Congress employs the passive voice. "The passive voice focuses on an event that occurs without respect to a specific actor." *Dean v. United States*, 129 S. Ct. 1849, 1853

(2009); *see also Watson v. United States*, 552 U.S. 74, 81 (2007) (holding that the statutory phrase "to be used" demonstrates "agnosticism . . . about who does the using"). If Congress had intended to limit jurisdiction to situations in which the defendant foreign state itself took the property, it would have inserted the words "by the foreign state" in the statute, right after "international law."

Nor is there is any good reason to deviate from the plain meaning of the statute. Petitioners contend that the court of appeals' holding "violates common law," which "broadly" affords immunity to foreign states unless they took property themselves. Pet. 24-25. But one of Congress's purposes in enacting the FSIA was to codify the "restrictive theory" of sovereign immunity, under which a state is granted immunity for its sovereign acts, but not for its commercial or private acts. *Altmann*, 541 U.S. at 689-91. Mr. Cassirer is seeking only to hold petitioners accountable for non-sovereign commercial conduct that a private person can and does perform, namely, their refusal to return to him the property that he owns, and which they display and exploit profitably in a museum. Moreover, the Ninth Circuit affirmed that the Foundation is "engaged in a commercial activity in the United States," Pet. App. 25a-30a, further evidence that the court's interpretation of Section 1605(a)(3) is consistent with the restrictive theory.

Contrary to petitioners' argument (Pet. 20-22), the FSIA's legislative history also supports the interpretation given to Section 1605(a)(3) by the court below.

The House Report states that "Section 1605(a)(3) would, in two categories of cases, deny immunity where 'rights in property taken in violation of international law are in issue.'" H.R. Rep. No. 94-1487 at 19 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6618. The House Report notes that the jurisdictional nexus requirement in Section 1605(a)(3) defines the "two categories" to which the legislative history refers: (1) if the property at issue is in the United States in connection with the foreign state's commercial activity, or (2) if an agency or instrumentality of the foreign state owns the property and that agency or instrumentality is engaged in a commercial activity in the United States. *Id.*[7] The legislative history cites "the nationalization or expropriation of property without payment of the prompt adequate and effective compensation required by international law" and "takings which are arbitrary or discriminatory in nature" as examples of conduct that "[t]he term 'taken in violation of international law'" encompasses, but in striking contrast to the history's discussion of the "two categories" of cases, here the legislative history omits any reference to the defendant foreign state,

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[7] Petitioners have no support for their statement that Section 1605(a)(3) "incorporates" the concepts of the Hickenlooper Amendment. Pet. 20. The Hickenlooper Amendment overrides application of the Act of State doctrine in expropriation cases; it does not address immunity. 22 U.S.C. § 2370(e)(2). The FSIA's legislative history specifically states that the FSIA is not intended to affect the Act of State doctrine. *See* 1976 U.S.C.C.A.N. at 6618; *Nemariam v. Federal Democratic Republic of Ethiopia*, 491 F.3d 470, 479 (D.C. Cir. 2007).

further evidence that Congress did not intend to require the defendant foreign state to have taken the property. *Id.*

The plain meaning of Section 1605(a)(3) also makes eminent sense. It is a standard tenet of U.S. property law that good faith purchasers are not entitled to keep stolen property. *See, e.g.*, Marilyn E. Phelan, *Scope of Due Diligence Investigation in Obtaining Title to Valuable Artwork*, 23 SEATTLE U. L. REV. 631, 633-34 (2000). There is no good reason why Congress would not have wanted to apply that doctrine here. While petitioners claim that the doctrine "would put an impossible burden on an innocent sovereign like Spain," Pet. 13, this is not so. If petitioners lose this case and return the Painting to Mr. Cassirer, they can seek reimbursement from the individual or entity from whom they purchased it, like any other recipient of stolen property.

E. Any Doubts Should Be Resolved In Favor of Denying Certiorari Because the Case Is In an Interlocutory Posture

Last but not least, the Court should deny the petition because this case is in an interlocutory posture. The parties still need to litigate substantive liability issues, as well as any other grounds for dismissal that petitioners may press. Waiting for these proceedings to play out will allow time to see whether any of the horrors petitioners predict do in fact arise, and, if additional cases are filed, waiting will allow

for further consideration of the issue by other lower courts. On the other hand, if petitioners win on remand, then this Court will have no need to address the questions presented here.

II. THERE IS NO NEED TO REVIEW THE COURT OF APPEALS' EXHAUSTION HOLDING

A. The Question Whether the FSIA Requires Exhaustion of "Available Remedies" Is Not Properly Presented

Petitioners ask this Court to decide whether a plaintiff relying on Section 1605(a)(3) of the FSIA must exhaust "available remedies in the relevant country" before bringing suit in the United States. Pet. i. This question is not presented here.

The Foundation "ma[de] no exhaustion argument" in the Ninth Circuit, and "d[id] not join Spain's." Pet. App. 30a n.20. For its part, Spain never disclosed to the Ninth Circuit "what remedies are available," *id.*, or even identified the country (Spain or Germany) in which Mr. Cassirer should supposedly seek such remedies. Spain's omission is reason enough to dispense with any exhaustion argument, for under standard exhaustion law, the defendant has the burden to demonstrate that there are available remedies in the foreign country. *See Hilao v. Estate of Ferdinand Marcos*, 103 F.3d 767, 778 n.5 (9th Cir. 1996) ("'The procedural practice of international human rights tribunals generally holds that the respondent has the

burden of raising the nonexhaustion of remedies as an affirmative defense and *must show that domestic remedies exist that the claimant did not use*.'" (quoting S. Rep. No. 249 at 9-10 (1991))) (emphasis added). Thus, whether Section 1605(a)(3) requires exhaustion when alternative remedies in "the relevant country" are "available," Pet. i, is a purely academic issue in this case – or at least at this point in the case's development.

B. The Court of Appeals' Holding That Section 1605(a)(3) Does Not Make Exhaustion "A Statutory Prerequisite To Jurisdiction" Is Narrow and Correct

The court of appeals held that Section 1605(a)(3) does not require a plaintiff to have attempted to exhaust remedies abroad as a jurisdictional prerequisite. Pet. App. 36a. In other words, the court of appeals declined to "read[ ] a mandatory exhaustion requirement into § 1605(a)(3)." *Id.* But the court of appeals declined to consider at this stage of the proceedings "whether prudential exhaustion may be invoked." Pet. App. 38a.

The court of appeals' narrow holding regarding mandatory exhaustion is correct, inasmuch as it accords with the absence of any exhaustion requirement in the text of Section 1605(a)(3). Numerous other statutes contain exhaustion requirements, demonstrating that Congress knows full well how to require exhaustion when it wishes to do so. *See, e.g.*, 28 U.S.C.

§ 1350 (note 2(b)) (Torture Victim Protection Act of 1991); 42 U.S.C. § 2000e-5 (Title VII). If petitioners wish Section 1605(a)(3) to require exhaustion, they should ask Congress to amend the statute rather than seek to have it rewritten by the judiciary.

None of the authority petitioners cites supports their claim that Mr. Cassirer must have attempted to exhaust remedies in a foreign state. Neither *Meyers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 50-51 (1938), nor the concurring opinion in *Patsy v. Board of Regents*, 457 U.S. 497, 518 (1982) (White, J., concurring), supports petitioners' exhaustion argument. Pet. 32 n.14. *Meyers* does not stand for any "general rule" that exhaustion is required before litigants sue in federal court; rather, *Meyers* simply rejected the argument that requiring a labor dispute to be considered, in the first instance, by the National Labor Relations Board violated the company's constitutional rights. In *Patsy*, Justice White recognized that "exhaustion is a statutory issue and the dispositive word on the matter belongs to Congress." 457 U.S. at 518. Where as here neither the plain language of the statute nor the legislative history suggest that Congress intended to require exhaustion, the Court should not do so either.

The two cases from the International Court of Justice – *Interhandel Case (Switz. v. U.S.)*, 1959 I.C.J. 6 (Mar. 21); *Case Concerning Elettronica Sicula S.p.A. (ELSI) (U.S. v. Italy)*, 1989 I.C.J. 15 (July 20) – simply discuss the norm that before a state will espouse a claim against another state on behalf of one

of its citizens, the citizen must have exhausted remedies in the foreign state. The State Department discusses this same norm in the statement from its website that petitioners cite. *See* Pet. 31 n.13. As noted above, *supra* at 13, espousal is a different situation than we have here.

The district court decisions in *Millicom International Cellular, S.A. v. Republic of Costa Rica*, 995 F. Supp. 14, 23 (D.D.C. 1998) and *Greenpeace, Inc. (U.S.A.) v. France*, 946 F. Supp. 773, 783 (C.D. Cal. 1996), and Justice Breyer's concurrence in *Altmann*, 541 U.S. at 714, likewise fail to suggest that Section 1605(a)(3) requires Mr. Cassirer to have exhausted remedies before bringing suit. These cases discuss exhaustion in the context of claims that a taking violated international law because the foreign state that expropriated the property failed to pay just compensation.[8] Mr. Cassirer, however, does not claim that Germany's looting of the Painting violated international law because Germany failed to pay just compensation. Rather he argues that the seizure of the painting violated international law because it was not done for a public purpose and was discriminatory

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[8] Furthermore, Justice Breyer also indicated by his citation to the Restatement that he was referring to the norm that a citizen must exhaust remedies before his or her country will espouse a claim against a foreign state. *See* Restatement § 713 cmt. f ("Under international law, ordinarily *a state is not required to consider a claim by another state* for an injury to its national until that person has exhausted domestic remedies.") (emphasis added).

and done in furtherance of the Nazi regime's genocide against Jews. *See Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 711-12 (9th Cir. 1992) (a taking violates international law if the victim does not receive just compensation, if the taking is not for a public purpose, or if the taking was discriminatory).[9] Exhaustion thus is not relevant to any of the issues in this case even if the Court were inclined to rewrite the FSIA to add such a requirement.

C. The Holding Is Consistent With the Only Other Court of Appeals Decision to Discuss the Issue

Only one other federal court of appeals has discussed whether Section 1605(a)(3) requires the plaintiff to exhaust remedies, and that court likewise determined that no exhaustion is required. In *Agudas*, the D.C. Circuit affirmed the district court's decision not to obligate a plaintiff invoking Section 1605(a)(3) to exhaust remedies in Russia. 528 F.3d at 948-49. The D.C. Circuit pointed to the absence of an exhaustion requirement in the plain language of the FSIA, and noted that the inclusion of an exhaustion requirement in another (now repealed) section of the FSIA "strengthens the inference that its omission

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[9] The fact that Germany provided some compensation to victims of Nazi persecution after World War II, Pet. 29 n.1, thus does not change the fact that the original taking of the Painting, as part of Nazi genocide against Jews, was in violation of international law.

from a closely related section must have been intentional." *Id.* at 948.

D. Reviewing the Court of Appeals' Holding Before Prudential Exhaustion Is Litigated on Remand Would Be Premature

As noted above, the court of appeals "went no further" than the district court did here, holding only that the expropriation exception "does not *mandate* exhaustion," and "declin[ing] to consider at this stage of the proceedings whether prudential exhaustion may be invoked" in this case. Pet. App. 36a, 38a.

It would be premature for this Court to consider whether the FSIA mandates exhaustion before any prudential exhaustion proceedings play out on remand. Nothing in the petition for certiorari contends that there is any meaningful difference between mandatory and prudential exhaustion, nor is it immediately apparent what that difference might be. Consequently, if petitioners have a valid claim for exhaustion (they have not yet shown that any alternate remedy was available), they should be required to make it on remand. And if they somehow advance such a valid claim and the district court and court of appeals still refuse to require exhaustion, then petitioners can bring the case back to this Court, with a full record and a tangible argument as to why mandatory exhaustion matters here. Unless and until that happens, there is no reason to review any exhaustion argument.

III. THERE IS NO CONSTITUTIONAL ARGUMENT PROPERLY PRESENTED HERE

At various points, petitioners assert that the court of appeals' interpretation of Section 1605(a)(3) violates "the Constitution" or "due process." *See*, *e.g.*, Pet. 13, 17. The Court should ignore such assertions because no constitutional issue is properly presented here. Neither of the questions presented in the petition encompasses a constitutional claim, so the Court may not consider any such claim. *See* S. CT. R. 14.1(a). In addition, no constitutional argument was "pressed or passed upon" below. *Clark v. Arizona*, 548 U.S. 735, 764-65 (2006).[10]

Indeed, the fact that petitioners now seem to want to press constitutional arguments for dismissing this case reinforces the wisdom of allowing the case to play out on remand before considering whether to grant certiorari. Once petitioners have litigated all of the defenses they wish to raise in the district court, and if necessary in the court of appeals, a full record will exist. If, at that point, petitioners have been

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[10] In any event, there is no constitutional barrier to subjecting petitioners to this lawsuit. Even if petitioners were right that it somehow violates the Due Process Clause to abrogate a foreign country's sovereign immunity without any action on its part, the Ninth Circuit's interpretation of Section 1605(a)(3) does depend on actions that petitioners have taken. Petitioners have refused to return the Painting to Mr. Cassirer, and the Ninth Circuit affirmed that the Foundation "is engaged in a commercial activity in the United States" in satisfaction of the jurisdictional nexus requirement in Section 1605(a)(3).

found liable, they may seek certiorari in this Court and challenge that liability in a single proceeding on any basis they wish.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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